PP v. CHUKWURAH EGBOH

COURT OF APPEAL, PUTRAJAYA
MOHTARUDIN BAKI JCA
TENGKU MAIMUN TUAN MAT JCA
ZAKARIA SAM JCA
[CRIMINAL APPEAL NO: B-05-310-11-2014 (NGA)]
14 DECEMBER 2015

CRIMINAL LAW: *Dangerous Drugs Act 1952 – Section 39B(1)(a) – Trafficking in 290.7g methamphetamine – Accused arrested at Kuala Lumpur International Airport – Capsules containing drugs found in accused's stomach – Whether accused committed crime under duress – Whether accused had knowledge of contents in capsules – Conduct of accused – Whether did not show innocence – Appellant did not pass through immigration check point – Whether element of trafficking negated – Whether any crime committed on Malaysian soil – Penal Code, s. 94 – Immigration Act 1959/63, s. 2*

The accused ('respondent'), a Nigerian University student, was charged for an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA') for trafficking in 290.7g of methamphetamine. The respondent was arrested at the Kuala Lumpur International Airport ('KLIA') after which he was brought to Hospital Serdang where an x-ray examination revealed images of foreign substances in his stomach. A total of 37 capsules containing 290.7g of methamphetamine were excreted from the respondent. In the High Court, the prosecution's case was premised on the fact that the respondent committed an offence of trafficking in dangerous drugs in Malaysia. The immigration officer, SP8, testified that while the respondent was detained in a temporary cell at KLIA, he was found to have re-swallowed a capsule discharged from his rectum. SP8 also said that the respondent did not insist that he wanted to meet the police. *Vide* his defence, the respondent alleged that one Martin agreed to lend money to the respondent if he agreed to work for him. Being in need of money to finance his studies, the respondent testified that he agreed with Martin's instructions to travel to Malaysia carrying capsules in his stomach which contained substances to dilute cocaine. The respondent submitted that his family would be harmed if he did not obey the instructions given to him. Further, the respondent was informed that the capsules were not illegal, valuable and were likely to be stolen if kept in a bag. The respondent further contended that when the plane landed at KLIA, he wanted to inform the police about the capsules but finally narrated the whole incident that took place to the customs officers. The High Court Judge found that the respondent raised a reasonable doubt in the prosecution's case and acquitted him. It was decided, *inter alia*, that (i) the respondent did not enter Malaysia by virtue of s. 2 of the Immigration Act 1959/63; (ii) the respondent was not aware that the capsules contained

dangerous drugs; (iii) the respondent did not proceed to the immigration counter but intended to approach the police once he landed at KLIA to inform about the capsules; and (iv) the respondent was acting under duress. Aggrieved by the decision, the prosecution appealed to this court.

Held (allowing appeal; setting aside decision of the High Court)
Per Tengku Maimun Tuan Mat JCA delivering the judgment of the court:

(1) The case for the prosecution was one of actual possession and presumed trafficking under s. 37(da) of the DDA. The finding of the mental state of knowledge, or the rebuttal of it was an inference to be drawn from all the facts and circumstances of a particular case. On the facts, the respondent was in custody and control of the drugs swallowed by him and carried inside his stomach. The respondent knew that he was carrying dangerous drugs. He was a university student and it was highly improbable that as an educated person, he merely accepted what was told to him, *ie*, that he had to swallow the substances since they were costly and may be stolen. This was not the only way to carry valuable items. Further, the respondent's act of re-swallowing the discharged capsule was not a conduct of an innocent person. (paras 25, 27 & 28)

(2) The fact that the respondent did not pass through the immigration counter did not negate the element of trafficking. Trafficking of drugs may occur anywhere on Malaysian soil, where its criminal jurisdiction extends. It may be committed at an airport either before or after an immigration checkpoint or on a ship or on board of an aircraft lying within her territory. Malaysia can claim criminal jurisdiction on any offender who commits that offence in any of the said places, it being a crime within her territory (*Isidro Leonardo Quito Cruz v. PP*; refd). (para 31)

(3) The respondent was not in the right frame of mind and his behaviour was due to the effect of the capsules in his stomach. There was no evidence that the respondent or his family members were faced with apprehension of instant death at the time the respondent committed the offence. The respondent placed himself in a situation of having to swallow the drugs and to travel to Malaysia. As such, the respondent could not avail himself of the defence of duress under s. 94 of the Penal Code. Thus, the act of the respondent was on his own accord. In the circumstances, the prosecution proved its case against the respondent beyond a reasonable doubt. (paras 30, 35 & 36)

Bahasa Malaysia *Headnotes*

Tertuduh ('responden'), seorang pelajar universiti berwarganegara Nigeria, dituduh melakukan satu kesalahan di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB') kerana mengedar 290.7g methamphetamine. Responden telah ditangkap di Lapangan Terbang Antarabangsa Kuala

Lumpur ('KLIA') dan dibawa ke Hospital Serdang di mana gambaran x-ray menunjukkan bahan asing di dalam perutnya. Sejumlah 37 kapsul yang mengandungi 290.7g methamphetamine telah dikeluarkan daripada responden. Di Mahkamah Tinggi, kes pihak pendakwaan adalah tertumpu kepada fakta bahawa responden telah melakukan kesalahan pengedaran dadah berbahaya di Malaysia. Pegawai imigresen, SP8, memberi keterangan bahawa semasa responden ditahan di sel sementara di KLIA, responden telah didapati menelan semula kapsul yang dikeluarkan dari duburnya dan bercakap dalam suara terketar-ketar. SP8 juga menyatakan bahawa responden tidak mendesak untuk berjumpa dengan polis. Melalui pembelaannya, responden mendakwa bahawa seorang bernama Martin telah bersetuju untuk meminjam wang kepada responden jika dia bersetuju untuk bekerja dengannya. Dalam keadaan terdesak untuk membiayai pelajarannya, responden memberi keterangan bahawa dia telah bersetuju dengan arahan Martin untuk datang ke Malaysia dengan membawa kapsul-kapsul tersebut di dalam perutnya yang mengandungi bahan-bahan untuk mencairkan kokain. Responden berhujah beliau diugut keluarganya akan dicederakan jika dia tidak mengikut arahan yang diberikan kepadanya. Tambahan, responden dimaklumkan bahawa kapsul-kapsul tersebut tidak menyalahi undang-undang, bernilai dan mempunyai kemungkinan untuk dicuri jika disimpan di dalam beg. Responden juga telah berhujah bahawa apabila mendarat di KLIA, dia berniat untuk memaklumkan pihak polis mengenai kapsul-kapsul tersebut tetapi akhirnya memberitahu segala kejadian yang berlaku kepada pegawai-pegawai kastam. Hakim Mahkamah Tinggi mendapati bahawa responden telah membangkitkan keraguan munasabah terhadap kes pihak pendakwaan dan membebaskannya. Diputuskan, antara lain, bahawa (i) responden tidak memasuki Malaysia berikutan s. 2 Akta Imigresen 1959/63; (ii) responden tidak mengetahui bahawa kapsul-kapsul tersebut mengandungi dadah berbahaya; (iii) setelah mendarat di KLIA, responden tidak pergi terus ke kaunter imigresen malah mencari polis untuk memberitahu mengenai kapsul-kapsul tersebut; dan (iv) responden bertindak dalam keadaan terpaksa. Tidak puas hati, pihak pendakwaan merayu ke mahkamah ini.

Diputuskan (membenarkan rayuan; mengetepikan keputusan Mahkamah Tinggi)

Oleh Tengku Maimun Tuan Mat HMR menyampaikan penghakiman mahkamah:

(1) Kes pendakwaan adalah tertumpu kepada milikan sebenar dan anggapan pengedaran di bawah s. 37(da) ADB. Penemuan keadaan mental untuk pengetahuan, atau penyangkalannya merupakan inferens yang boleh dibuat daripada segala fakta dan keadaan sesuatu kes. Berdasarkan fakta, responden mempunyai milikan dan kawalan dadah yang ditelan dan

dibawa dalam perutnya. Responden mengetahui bahawa dia membawa dadah berbahaya. Beliau merupakan seorang pelajar universiti dan tiada kemungkinan bahawa selaku seorang yang berpendidikan, dia hanya menerima apa yang diberitahu kepadanya, iaitu, menelan bahan-bahan yang didakwa bernilai dan boleh dicuri. Ini bukanlah cara untuk membawa barangan bernilai. Tambahan, kelakuan responden menelan semula kapsul yang dikeluarkan bukanlah perbuatan seorang yang tidak bersalah.

(2) Fakta bahawa responden tidak melalui kaunter imigresen tidak mengetepikan unsur pengedaran. Pengedaran dadah boleh berlaku di mana-mana atas tanah Malaysia, di mana bidang kuasa jenayahnya dilanjutkan. Perbuatan ini boleh berlaku di sebuah lapangan terbang sama ada sebelum atau selepas pusat pemeriksaan imigresen atau atas kapal atau pesawat yang berada di wilayahnya. Malaysia boleh menuntut bidang kuasa jenayah terhadap seseorang pesalah yang melakukan kesalahan tersebut di mana-mana tempat yang dinyatakan, yang merupakan jenayah di wilayahnya (*Isidro Leonardo Quito Cruz v. PP*; dirujuk).

(3) Responden tidak berada dalam keadaan minda yang betul dan kelakuannya adalah berpunca daripada kesan kapsul-kapsul di dalam perutnya. Tiada keterangan bahawa responden atau ahli keluarganya telah diugut mati semasa responden melakukan kesalahan ini. Responden sendiri meletakkan dirinya di dalam keadaan ini di mana dia telah menelan dadah tersebut dan datang ke Malaysia. Oleh itu, responden tidak boleh berjaya dalam pembelaan paksaan di bawah s. 94 Kanun Keseksaan. Oleh itu, kelakuan responden berlaku daripada tindakannya sendiri. Dalam keadaan ini, pihak pendakwaan telah berjaya untuk membuktikan kesnya terhadap responden melampaui keraguan munasabah.

Case(s) referred to:
Chan Pean Leon v. PP [1956] 1 LNS 17 HC ***(refd)***
Chu Tak Fai v. PP [1998] 4 CLJ 789 CA ***(refd)***
Isidro Leonardo Quito Cruz v. PP [2013] 2 CLJ 1025 FC ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, s. 37(da)
Immigration Act 1959/63, s. 2
Penal Code, s. 94

For the appellant - Tetralina Ahmed Fauzi; DPP
For the respondent - N Sivananthan (Syazlin Mansor with him); M/s Sivananthan

[Appeal from High Court, Shah Alam; Criminal Trial No: 45A-195-09-2012]

Reported by Kumitha Abd Majid

JUDGMENT

Tengku Maimun Tuan Mat JCA:

[1] The respondent was charged in the High Court at Shah Alam for trafficking in dangerous drugs. The charge reads:

> Bahawa kamu pada 21 Februari 2012 di antara jam lebih kurang 4.00 petang hingga 8.50 malam di tandas Wad 6C, Bilik 27 Tingkat 6, Hospital Serdang, Jalan Puchong, di dalam Daerah Kajang dalam Negeri Selangor Darul Ehsan, telah didapati mengedar dadah berbahaya iaitu Methamphetamine seberat 290.7 gram dan dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah Seksyen 39B(2) Akta yang sama.

[2] We do not propose to set out the facts except to state that the respondent was arrested at the Kuala Lumpur International Airport (KLIA) on 21 February 2012 after which he was brought to the Hospital Serdang where an x-ray examination revealed images of foreign substances in his stomach. The respondent was warded and between 4pm until 8.50pm on 21 February 2012, the respondent excreted a total of 37 capsules.

[3] Upon examination by the chemist, Suhana binti Ismail (SP1), the substances contained in the capsule was confirmed to be methamphetamine weighing 290.7g.

[4] At the end of the prosecution case, the learned trial judge found that the prosecution had proven all the ingredients of the charge. A *prima facie* case having made out, the respondent was called upon to enter his defence.

The Defence

[5] In his evidence given under oath, the respondent stated that he came from Nigeria. He has ten siblings and he is the only son. At the time of the offence, he was an undergraduate at the Anambra State University majoring in textile and clothing.

[6] In February 2011, the respondent's father became ill and needed money for his treatment. The respondent applied for a loan from a money lending company but because the respondent was unable to provide security for the loan, his application was rejected.

[7] One of the employees of the company suggested to the respondent to contact the owner of the company, one Mr Martin, which the respondent did. Mr Martin agreed to lend the money on condition that the respondent works for him. The respondent agreed.

[8] The respondent was instructed by Mr Martin to apply for a passport. The processing fees for the passport were borne by Mr Martin. The respondent was then informed by Mr Martin that he will be sent to South Africa to deliver some goods. However, the respondent was not sent to South Africa but was told to wait for further instructions from Mr Martin.

[9] Subsequently, the respondent's father passed away. In December 2011, the respondent met Mr Martin for the first time. Mr Martin had asked the respondent whether he could go to Malaysia. Since he needed money to finance his studies, the respondent agreed.

[10] Mr Martin then applied for the visa and flight tickets to Malaysia as well as booked a hotel room for the respondent.

[11] On 15 February 2012, Mr Martin contacted the respondent where the respondent was asked to go to Lagos. In Lagos, the respondent met Mr Martin. The respondent was asked to stay in a hotel room. On 17 February 2012, the respondent was asked to swallow a total of 87 to 88 capsules. The respondent was told by Mr Martin that the capsules contained 'substance to dilute cocaine'. The respondent only managed to swallow about 28 capsules. Thereafter a friend of Mr Martin brought the respondent to the Republic of Benin.

[12] In Benin, the respondent was again asked to swallow the remaining capsules but he only managed to swallow nine capsules. Mr Martin's friend convinced the respondent that the capsules were not illegal and they were not drugs and that he must swallow the capsules as they were valuable and likely to be stolen if kept in a bag.

[13] The respondent had initially refused to carry on, but finally obeyed and boarded the flight to Malaysia *via* Qatar Airways after Mr Martin's friend threatened to harm the respondent's family since a lot of money had been spent on the substances in the capsules. Before boarding the flight, Mr Martin's friend handed over the respondent's passport, the hotel booking confirmation form in Malaysia as well as cash of USD3,000 to the respondent.

[14] During the flight transit in Doha, the respondent informed the captain of the capsules which he carried in him. The captain brought the respondent to the authorities at the Doha airport but the said authorities informed the respondent that they could not do anything about it. Since the respondent's final destination was Malaysia, the respondent was asked to report the matter to the Malaysian authorities.

[15] When the plane landed at KLIA, the respondent wanted to inform the police about the capsules and that he had no intention to enter Malaysia. The respondent threw away the cash of USD3,000, the return flight ticket and the hotel booking confirmation form in a dustbin at the Satellite Building, KLIA. While searching for a police officer, the respondent saw a man wearing a blue uniform with a walkie talkie. Thinking the man to be a police officer, the respondent informed him about the capsules.

[16] It turned out that the man was a security guard. The security guard then contacted someone and thereafter, a man and a woman came to the respondent at the Satellite Building. They asked for the respondent's passport and how much money he had with him. The respondent replied that he only had some Yen and Qatar currencies.

[17] The respondent was then brought to a cell at KLIA where he was detained. The respondent was informed that he was not allowed to enter Malaysia and that he would be deported to his home country, Nigeria.

[18] Nonetheless, soon after, some customs officers came to meet the respondent where the respondent narrated to them his predicament. The customs officer then took the respondent to the Serdang Hospital where he excreted the capsules.

Findings Of The High Court

[19] At the conclusion of the trial, the learned trial judge found that the defence was "sesuatu yang sangat munasabah dan wajar untuk diterima" and had raised a reasonable doubt on the prosecution case.

[20] In concluding that the respondent had raised a reasonable doubt on the prosecution case, the learned trial judge had stated (appeal record vol. 1, pp. 18-20):

> 3. Tertuduh memang tiada niat untuk masuk ke Malaysia. Beliau telah membuang wang tunai USD 3000, tiket penerbangan dan tempahan hotel di dalam tong sampah ketika beliau berada di Bangunan Satellite KLIA. Keterangan Tertuduh ini disokong oleh keterangan SP8 (Pegawai Imigresen) dan SP5 (Pegawai tangkapan) yang menyatakan mereka tidak menjumpai dan merampas apa-apa wang tunai USD, tempahan hotel di Malaysia ataupun tiket penerbangan dari Tertuduh. Ini jelas menunjukkan yang Tertuduh telah 'abundance' (*sic*) niatnya untuk memasuki Malaysia.
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> 4. Tertuduh mula curiga apabila diminta untuk menelan kapsul-kapsul tersebut dan menyatakan ingin membatalkan niatnya untuk menghantar bahan tersebut. Namun kawan Mr. Martin mengugut mahu mencederakan keluarga Tertuduh. Tertuduh menyatakan yang dia tidak membuat laporan polis tentang ugutan tersebut kerana Mr. Martin seorang yang berpengaruh serta kaya. Adat orang Afrika, siapa yang kaya dialah yang berkuasa dan dengan sewenangnya boleh membuat apa sahaja yang dia inginkan. Jadi ini menimbulkan rasa takut dan khuatir bukan sahaja untuk dirinya, juga terhadap keselamatan keluarga Tertuduh.
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> 5. Penama Martin ini telah diberitahu oleh Tertuduh kepada pihak Pegawai Penyiasat semasa rakaman percakapan amarannya (D56) dilakukan. Martin bukanlah satu watak rekaan. Ia telah dibangkitkan semasa kes Pendakwaan lagi. Keterangan Tertuduh di Mahkamah adalah 'consistent' (*sic*) dengan keterangan beliau semasa perakaman D56.

A

6. Tertuduh hanya mengikut arahan Martin telah menghantar bahan tersebut ke Malaysia. Tertuduh tidak tahu isi kandungan kapsul-kapsul tersebut. Dia datang ke Malaysia di atas ugutan yang dibuat oleh kawan Martin semasa di Republik Benin.

B

7. Keengganan Tertuduh untuk meneruskan penghantaran tersebut jelas apabila Tertuduh telah mengadu kepada Kapten Pesawat semasa transit di Doha, Qatar. Sesampai di KLIA, Tertuduh pula tidak terus ke kaunter imigresen sebaliknya mencari polis untuk memberitahu tentang masalah yang dihadapinya. Perjelasan ini telah dapat menyangkal kes pihak Pendakwaan.

C

8. Tiada keterangan langsung (direct evidence) yang menunjukkan bahawa Tertuduh telah mengedar dadah tersebut. Tiada terdapat tindakan atau perlakuan dari Tertuduh yang boleh ditakrifkan sebagai 'overt act'.

D

9. Di dalam kepercayaan Tertuduh bahawa bahan di dalam kapsul tersebut adalah sejenis bahan untuk 'dilute cocaine' dan bukannya dadah.

10. Tertuduh tidak pernah masuk ke Malaysia. Notis IM 96 (P55) dikeluarkan kerana Tertuduh tidak penuhi syarat untuk masuk ke Malaysia. Notis yang dikeluarkan itu melarang Tertuduh untuk masuk ke Malaysia.

E

[21] After alluding to the meaning of "Entry" in s. 2 of the Immigration Act 1959/63, the learned trial judge further found (appeal record vol. 1, p. 22):

F

> Keterangan menunjukkan yang Tertuduh tidak pernah meninggalkan kawasan lapangan terbang KLIA sebelum diserahkan kepada pihak Kastam. Tertuduh juga tidak pernah melepasi kaunter imigresen untuk masuk ke Malaysia. Oleh itu berdasarkan kepada kemasukan di bawah Seksyen 2 Akta Imigresen, Tertuduh tidak pernah masuk ke Malaysia. Cop pada passport Tertuduh tidak wajar dikira sebagai "Entry" ke Malaysia kerana cop tersebut diberikan untuk tujuan memenuhi syarat supaya Tertuduh dapat diserahkan kepada pihak Kastam.

G

> Dari rentetan peristiwa itu, sesuatu yang jelas bahawa Tertuduh tidak pernah masuk ke Malaysia. Pihak Pendakwaan telah gagal untuk membuktikan bahawa Tertuduh telah masuk ke Malaysia dan mengedarkan dadah tersebut di Malaysia. Tertuduh nampaknya telah bersedia untuk dihantar pulang ke Negara asalnya. Jelaslah, Tertuduh tidak mempunyai apa-apa niat untuk mengedarkan dadah tersebut di Malaysia. Keterangan ini telah menyangkal apa-apa inferen atau anggapan bahawa Tertuduh telah mengedarkan dadah tersebut di Malaysia.

H

[22] The respondent was acquitted and discharged.

I

[23] Aggrieved by the decision, the prosecution lodged an appeal to this court. We heard the appeal at the end of which we had unanimously allowed the appeal. We set aside the order of acquittal and discharge by the High

Court and we substituted with an order that the respondent be convicted of the charge and sentenced to death. Our reasons now follow.

The Appeal

[24] For the prosecution, learned DPP raised three issues namely:

(i) that the respondent failed to raise a reasonable doubt on the prosecution case;

(ii) that the respondent had committed an offence of trafficking in Malaysia; and

(iii) that the defence of duress cannot be accepted.

Our Findings

[25] Taking the first and the second issues together we found merits in the submission of learned DPP. The case for the prosecution is one of actual possession and presumed trafficking under s. 37(da) of the Dangerous Drugs Act 1952. From the evidence, it cannot be denied that the respondent was in custody and control of the drugs which he had swallowed. The respondent had carried inside his stomach 37 capsules containing methamphetamine. The principle of law is settled that the finding of the mental state of knowledge, or the rebuttal of it, is an inference to be drawn from all the facts and circumstances of a particular case (see *Chan Pean Leon v. PP* [1956] 1 LNS 17; [1956] 1 MLJ 237).

[26] The respondent said that he was informed by Mr Martin's friend that the substances were not illegal and that they were not drugs but substances to dilute cocaine. He was asked to swallow them because the substances were costly to be carried in the luggage.

[27] In our judgment, the respondent knew that what he was carrying was dangerous drugs. The respondent was a university student. It was highly improbable that as an educated person, he merely accepted what was told to him and it was incredible that just because the substances were costly and may be stolen, they had to be swallowed, a dangerous act to do. Surely that was not the only way to carry valuable items.

[28] The finding of the learned trial judge that the respondent had no intention to enter Malaysia and to traffic in dangerous drugs in Malaysia was made without regard to the following evidence of Wan Hazman bin Wan Hamdan, the immigration officer (SP8) where he stated in examination in chief (appeal record vol. 1, pp. 56-57) that:

> A : Kami dapat rujukan daripada pihak Security MAB ada warga Negara Nigeria telah membuat kacau di satellite building dan menyuruh kami membuat tindakan selanjutnya. Setelah dirujuk, kami dapati subject punya kelayakan untuk masuk, dan saya soal wang tunjuk yang dia bawa, hotel booking dan ternyata semua yang kami soal itu tidak dapat dipenuhi oleh subject.

Q : Selepas itu?

A : Selepas daripada soal siasat yang kami jalankan kepada subject, bilamana subject tidak memenuhi apa keperluan yang kami perlukan, kami telah mengeluarkan satu notis penolakan masuk IM 96 untuk ditahan disel sementara untuk dihantar pulang.

...

Q : Apa berlaku pada tertuduh disel?

A : Subject telah membuat kacau disel dengan mengganggu tahanan lain dan saya hadir ke sana, memang beliau membuat kacau di dalam sel tersebut dan saya cuba tenangkan beliau supaya tidak berkelakuan seperti itu.

Q : Apa yang berlaku seterusnya?

A : Selepas itu beliau kembali tenang dan selepas beberapa lama saya dipanggil semula oleh Staff saya yang passenger tersebut telah mengeluarkan sesuatu daripada duburnya dan telah dimaklumkan juga yang beliau telah mencuci balik benda yang dikeluarkan dan menelannya kembali .....

In our view, re-swallowing the discharged capsule is not a conduct of an innocent person.

[29] SP8 had further testified as follows in cross-examination (appeal record vol. 1, p. 60):

Q : Setuju dengan saya, bahawa semasa di sel, OKT telah menyatakan kepada kamu, bahawa beliau ingin berjumpa dengan polis?

A : Saya tidak dimaklumkan dia ingin berjumpa dengan pihak polis. Hanya saya tahu dia meracau dan saya pergi ke sana untuk menenangkan beliau.

Q : Macam mana keadaan beliau semasa disel?

A : Semasa disel keadaan beliau macam tak tentu, berpeluh-peluh badannya dan macam bercakap pun suara dia terketar-ketar semasa itu.

Q : Setuju sebenarnya apa yang berlaku dalam sel adalah beliau insist untuk berjumpa dengan pihak polis tetapi tidak dilayan oleh pegawai yang bertugas?

A : Beliau tidak menyatakan beliau hendak berjumpa dengan pihak polis.

[30] There was no reason not to accept the evidence of SP8 that the respondent did not ask for a police officer. Further, the above evidence clearly showed that the respondent was not in the right frame of mind. It would not be too far-fetched for us to opine that the behaviour of the respondent was due to the effect of the capsules in his stomach.

[31] The fact that the respondent had not passed through the immigration counter did not negate the element of trafficking. We found guidance in the judgment of the Federal Court in *Isidro Leonardo Quito Cruz v. PP* [2013] 2 CLJ 1025 at p. 1040:

> [28] An offence under s. 39B DDA is proven when the court is satisfied beyond a reasonable doubt that the offender was in possession of dangerous drugs. With proof of care and custody being the pre-requisites, and once this minimal element is proven and the presumption under s. 37(da) is triggered, the offence of trafficking would be established.
>
> [29] Trafficking of drugs may occur anywhere on Malaysian soil, where its criminal jurisdiction extends. It may be committed at an airport, either before or after an immigration checkpoint or on a ship or on board of an aircraft lying within her territory. Malaysia can claim criminal jurisdiction on any offender who commits that offence in any of the said places, it being a crime within her territory.
>
> [30] The appellant in this case was clearly on Malaysian soil. Even if he had not alighted from the aircraft, now parked at KLIA, he would still be in Malaysia and subject to her criminal laws.

[32] We move on to the defence of duress which is provided for under s. 94 of the Penal Code and which reads:

> Except murder offences included in Chapter VI punishable with death and offences included in Chapter VIA, nothing is an offence which is done by a person who is compelled to do it by threats, which at the time of doing it, reasonably cause the apprehension that instant death to that person will otherwise be the consequence:
>
> > Provided that the person doing the act did not of his own accord, or from a reasonable apprehension of harm to himself short of instant death, place himself in the situation by which he became subject to such constraint.

[33] In *Chu Tak Fai v. PP* [1998] 4 CLJ 789; [1998] 4 MLJ 246, Denis Ong JCA said at p. 808 (CLJ); p. 264 (MLJ):

> It was settled law since *Tan Seng Ann v. PP* [1949] MLJ 87 that a plea of duress under s. 94 of the Penal Code (FMS Cap 45) to be successful, must be imminent, extreme and persistent at the time of the commission of the offence.

[34] The evidence of the respondent showed no imminent, extreme and persistent threat by Mr Martin's friend. All that was disclosed in the evidence of the respondent was the following (appeal record vol. 1, p. 67):

> Q : After you swallow 37 capsules in Bane (*sic*) what happened?
>
> A : I told them, I cannot do it anymore, I don't want to travel anymore.
>
> Q : Why?
>
> A : Because I'm afraid. They started treating (*sic*) me with my family. They would harm my family. Because they have spent a lot of money.

A ...

Q : Why didn't you to (*sic*) police station to report or make a complaint?

A : Even if I report to police, they can still harm my family. In Africa, money worked, if you have the money how have the power (*sic*).

B **[35]** There was absolutely no evidence that the respondent or his family members were faced with the apprehension of instant death at the time the respondent committed the offence. Coupled with the fact that by contacting Mr Martin, it was the respondent who had placed himself in the situation of having to swallow the drugs and to travel to Malaysia, we found that the C respondent could not avail himself of the defence of duress under s. 94 of the Penal Code. The act of the respondent was clearly of his own accord.

[36] Having regard to all the above, we were unanimous in our view that the prosecution had proved its case against the respondent beyond reasonable doubt. We therefore allowed the appeal by the prosecution. The order of D acquittal and discharge by the High Court was set aside. The respondent was convicted and sentenced to death.

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